BANK OF COMMERCE

v.

TANJUNG PETRI ENTERPRISE

HIGH COURT MALAYA, JOHOR BAHRU
JAMES FOONG J
[ORIGINATING SUMMONS NO. 24-370 OF 1990]
17 MARCH 1992

CIVIL PROCEDURE: *Whether applicant's application is wrong in law and should be set aside - Whether application can be made only when there is a pending suit - Whether the Court shall exercise its discretion - Order 2 rr. 1, 2 of the Rules of the High Court 1980 - To apply.*

This is an *ex parte* application for the appointment of a receiver/manager into the respondents company and when the said matter came up for hearing, it was made *inter parte.*

Inter alia, it was alleged that the respondent had failed to service the loan granted by the applicant as bankers and it was also alleged that the respondents have stopped work on the said housing project and were unable to complete the said project due to financial difficulties. The respondents objected to this application.

The issue before the Court was whether the applicant's application *vide* originating summons for the appointment of a receiver/manager is wrong in law and whether the said application can be made independently.

Held:

[1] The learned Judge found that the application for the appointment of a receiver/ manager under O. 30 r. 1 of the Rules of the High Court, must be made when there is pending suit.

[2] Such right to apply for the appointment of a receiver/manager to preserve the said property is not a cause of action. It cannot, like an *interlocutory* injunction stand on its own. It is dependent upon there being a pre-existing cause of action against the respondents. When there is no pre-existing cause of action, the Court cannot grant such an application until a cause of action is filed and such application is made thereunder.

[3] The learned Judge took the view that this application is wrong and bad in law. It is not an irregularity of the rules but it goes to the heart and core of the matter where one has no right whatsoever in these circumstances to commence such application without a *lis pendens*.

[Application dismissed with costs.]

Legislation referred to:
Rules of the High Court 1980, O. 2 rr. 1, 3, O. 30 r. 1
Specific Relief Act 1950, s. 43

For the applicants - Ibrahim Hashim; M/s. Hassan Ibrahim & Co.
For the respondents - Yeo Yang Poh; M/s. Tan, Hoon & Tee

JUDGMENT

James Foong J:

This is an application of the applicants by way of an originating summons, made *ex-parte* for the appointment of a receiver/manager into the respondent company under O. 30 r. 1 of the High Court Rules. When this matter finally came up for hearing before me, it was made *inter-parte.*

The respondents are a housing development company engaged in the development of a housing estate by the name of Taman Mawai in Johor. The applicants are bankers who had granted a loan of RM2 million to the respondents. As security for the repayment of the said loan, various documents of title belonging to the respondent are charged to the applicants by way of a first legal charge.

The applicants alleged that the respondents have failed to service the loan granted to the respondents. Further, it is also alleged that the respondents have stopped work on the said housing project and are unable to complete the said project due to financial difficulties. The respondents objected to this application.

During the hearing of this application both Counsel for the applicants and the respondents seemed to have agreed that there is a preliminary issue that must first be settled before the merits of the case should be considered. I am in total agreement with this approach.

The preliminary issue in this case relates to the respondents' objection that the applicants' application is wrong in law and should be set aside.

The applicants as stated earlier, made this application to this Court by way of an originating summons for the appointment of a receiver/manager of the respondents. This, the respondents argued is wrong in law for reason that this application cannot be made in this manner independently and not arising from a matter pending suit.

After careful consideration of the submissions by both Counsel for the applicants and the respondents, I find that the application for the appointment of a receiver/manager under O. 30 r. 1 of the High Court Rules must be made when there is a pending suit.

The objective of the appointment of a receiver/manager under circumstances provided for in the Rules of the High Court is to preserve any property where litigation is pending, before the Court decides on the rights of the parties. This is to prevent any scramble among those entitled to the property which is not in anyone's actual possession or, where misconduct or maladministration is alleged against persons who are in a fiduciary capacity.

Such right to apply for the appointment of a receiver/manager to preserve the said property is not a cause of action. It cannot, like an interlocutory injunction stand on its own. It is dependent upon there being a pre-existing cause of action against the respondents. When there is no pre-existing cause of action, the Court cannot grant such an application until a cause of action is being filed and such application is made thereunder.

This Court is in full agreement with the decision of *Salter v. Salter* [1896] p. 296 where it rejected an application for the appointment of a receiver without a cause or matter pending suit. This Court further considers the view of Rigby J in that case as sound law where he said as follows:

> But in order to obtain a receiver you must approach the Court in a proper way: the intervention of the Court cannot be asked for except in a proper proceeding. Unless there is a *lis pendens* there is no way of approaching the Court.

Even s. 43 of the Specific Relief Act relating to the appointment of the receiver by the Court uses the words "pending a suit".

Section 43 of the Specific Relief Act reads as follows:

> The appointment of a Receiver pending a suit is a matter resting in the discretion of the Court.

Therefore, it follows that such an application for the appointment of a receiver must be dependent or arising out of a pending suit.

The applicants' Counsel informed this Court that there is an actual suit pending bearing No. 22-149-1990 filed against the respondents in this High Court. Though this information is stated in the affidavit filed in support of the application but the question remains as to why this application was not made thereunder. The writ filed against the respondents is not annexed to the affidavit filed in support of this application nor are the particulars of the said writ disclosed to enable this Court to determine whether the issues are similar to this application for appointment. Under these circumstances, this Court cannot entertain the submission that this application is related to that civil suit.

The learned Counsel for the applicants also urged this Court to exercise its discretion under O. 2 r. 1 & 3 of the High Court Rules, where failure to comply with requirements of the Rules of the High Court should be treated as an irregularity and should not nullify the proceedings. I cannot agree to this application of the learned Counsel for reason that from the very start this application is wrong and bad in law. It is not an irregularity of the rules but it goes to the heart and core of the matter where one has no right whatsoever in these circumstances to commence such application without a *lis pendens.*

I therefore dismissed the application with costs.

Also found at [1992] 2 CLJ 1196